Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1798

HARRY BERNSTEIN, ROSE BERNSTEIN,
and EASTERN SERVICE CORPORATION,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS HARRY BERNSTEIN, ROSE BERNSTEIN, and EASTERN SERVICE CORPORATION

FRANK G. RAICHLE,
Attorney for Petitioners,
10 Lafayette Square,
Buffalo, New York 14203,
Tel. No. (716) 852-7587.

RAICHLE, BANNING, WEISS & HALPERN,
Of Counsel.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
20 CENTER ST., BATAVIA, N. Y. 14020
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Statement

After the Government obtained an extension of time to file its brief until and including September 2, 1976, two months later it filed the same. This is just a word in reply to answer a claim made for the first time by the Government to the effect that,

> "The facts of this case, in our view, go far beyond showing that petitioners ESC, the Bernsteins, and Behar recklessly failed to verify information contained in mortgage applications; they demonstrate outright

collusion between those parties and others in a scheme to deliberately file false and misleading statements of employment and self-employment with FHA in support of applications for insurance that they knew would otherwise not be approved."

(Government's brief, P. 16.)

Throughout the nine months trial and the appeal to the Second Circuit, the Government has expressly conceded that neither Eastern Service Corporation nor the defendants Bernstein had actual knowledge that the statements being submitted to the FHA were false (R.* 18742, 15543, 20640-1).

At R. 15543, Government counsel stated, "Eastern Service Corporation had no full knowledge of any false statements." In his summation Government counsel said,

". . . . of all these defendants the Government is only claiming that one of those defendants, that is, Melvin Cardona, had actual knowledge that the statements being submitted in the counts he is involved in were false." (20640-1)

The Government is in error when it states at p. 23 of its brief in opposition that the court's "charge did not indicate that it was a crime not to exercise 'proper credit judgment' and did not equate failure to do so with reckless disregard of the truth." At R. 21618, just before the jury retired, the court charged as follows:

"Now, I also was asked to clarify the charge that I gave you concerning the affirmative duty.

"You will recall that I referred to affirmative duty as being *a question of fact for you to determine* if the FHA plays (sic) an affirmative duty on various defendants. I would like to clarify the nature of that duty which *you may or may not find exists.*

* R. refers to stenographic minutes of trial.

"As to Eastern Service, Harry Bernstein and Florence Behar, the question is, one, was there a duty to investigate and *exercise proper credit judgment* with respect to statements contained in applications for mortgage insurance submitted to the FHA?" (Emphasis added.) (21618, C709)

See, also, Appendix E of our petition.

Prompt and proper exception to this further erroneous charge by the Court was taken by all of the defendants (21622-21623, C713-14). All that we have urged against the charge as originally given is applicable to this erroneous attempt to "clarify the charge" on the subject of "affirmative duty." Indeed, it was more aggravated and, if possible more harmful because after days of instruction, confusing at best, impossible to understand at worst and clearly erroneous, it was the last thing that the jurors heard before they went out to deliberate.

As stated by this court in *Bollenbach v. United States*, 326 U.S. 607, 613 (1946),

"Particularly in a criminal trial, the judge's last word is apt to be the decisive word."

The writ applied for should be granted.

Dated: November 18, 1976.

Respectfully submitted,

FRANK G. RAICHLE,
Attorney for Petitioners
Harry Bernstein, Rose Bernstein
and Eastern Service Corporation,
10 Lafayette Square,
Buffalo, New York 14203,
Tel.: (716) 852-7587.

RAICHLE, BANNING, WEISS & HALPERN,
Of Counsel.

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